



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC CASE NO. 287 OF 2015
(Formerly NAIROBI ELC NO. 1212 OF 2015)

PETER KURIA KANYUKU.....PLAINTIFF/APPLICANT

-VERSUS-

NANCY WANJIKU KAARA.....1ST DEFENDANT/RESPONDENT

PETER KAMAU GITHAIGA.....2ND DEFENDANT/ RESPONDENT

MURANG'A DISTRICT LAND REGISTRAR.....3RD DEFENDANT/RESPONDENT

RULING

Introduction

1. By a plaint dated 25th November, 2015, the plaintiff herein, **Peter Kuria Kanyuku**, brought this suit seeking the reliefs enumerated therein against the defendants jointly and severally.
2. The plaintiff's case is that the 1st defendant irregularly obtained a title deed in respect of title **No. Loc.19/Kiawambogo/2656** (the suit property) and later transferred it to the 2nd defendant herein.
3. Explaining that the 2nd defendant has threatened to evict his son who resides in the suit property, the plaintiff avers that his son refused to heed the 2nd defendant's demand leading to commencement of a suit at Murang'a Law Court's to wit, Murang'a CMCC No. 10 of 2015. It is pointed out that in the Murang'a case, the 2nd defendant seeks eviction orders against the plaintiff's son.
4. Maintaining that the suit property was transferred to the 1st and 2nd defendant illegally, the plaintiff contends that the 1st and 2nd defendants' registration as the proprietors of the suit property, contravened his right to acquire and own property and was to that extent a nullity in law.
5. Simultaneously with the plaint, the plaintiff filed the notice of motion of even date seeking the following reliefs:-

1. **Certification of the application as urgent and deserving to be heard *ex parte* in the first instance;**
2. **A temporary injunction to restrain the 1st and 2nd defendants by themselves, their servants, agents and /or any other person claiming through them from entering, remaining upon, using, dealing with or otherwise transacting upon the suit property or any other title derived there from pending hearing of the application and the suit.**
3. **Stay of proceedings in Murang'a CMCC No.10 of 2015, Kangema PMCC Land Dispute Tribunal Case No.29 of 2008 and the appeal in Nyeri Provincial Appeals Committee.**
4. **An order directing the OCS Kangema Police Station to ensure compliance with the orders herein, if issued.**
5. **Costs of the application.**

6. The application is premised on the grounds that the plaintiff is the registered proprietor of the suit property; that the 1st respondent unprocedurally obtained title deeds to the suit property. The plaintiff is apprehensive that unless the orders sought are granted, the respondents may continue to deal with the suit property in a matter prejudicial to his interest therein (may evict him and his family from the suit property). The respondents may also transfer the suit property to unsuspecting members of the public.

7. The orders sought are said to be necessary in order to uphold and safeguard the applicant's constitutional right to protection of property.

8. In reply and opposition to the application the 2nd defendant/respondent vide his replying affidavit sworn on **31st May, 2016** has deposed that he is the lawful registered proprietor of the suit property having obtained it for valuable consideration without notice. He points out that the property was transferred to him through a lawful court decree which has never been set aside.

9. Based on the document marked **PKK-5** annexed to the applicant's supporting affidavit, it is deposed that there is nothing to stay in Kangema Principal Magistrate courts Land Disputes Tribunal Case No.29 of 2008.

10. With regard to the Murang'a Civil Case No.10 of 2015, the 2nd respondent has deposed that the reliefs sought are different from those sought in the current proceedings and that the defendant in that suit is not a party to this suit.

11. Terming the application scandalous, misconceived, and frivolous and an abuse of the process of the court, the 2nd respondent contends that the orders sought are untenable in law.

12. The plaintiff/applicant is faulted for having failed to use the right legal process of challenging orders allegedly irregularly obtained.

13. When the matter came up for hearing counsel for the applicant, **Mr. Njomo**, informed the court that the applicant is the registered proprietor of the suit property and pointed out that the suit property was subject of proceedings filed by the 1st defendant/respondent before the defunct Land Disputes Tribunal. He further pointed out that the Tribunal made an award in favour of the 1st respondent (directed that the suit property be transferred to the 1st defendant/respondent), which decision the applicant appealed before the Provincial Appeals Tribunal. He explained that before the appeal was heard and determined, pursuant to orders obtained in Kangema Principal Magistrate Court, the award was adopted as the judgment of the court and the suit property transferred to the 2nd defendant/respondent without the applicant's title being cancelled.

14. After the suit property was registered in his name, the 2nd defendant/respondent commenced a civil case in Murang'a law courts seeking to evict the plaintiff from the land. He pointed out that the Murang'a suit is still pending and urged the court to stay it.

15. Based on the provisions of **Section 3** of the Land Dispute Tribunal Act (LDTA, repealed), counsel for the applicant, submitted that the tribunal exceeded its mandate by dealing with issues of title. He informed the court that the suit property had been given to the plaintiff vide Nairobi Succession Cause No.69 of 2001 and submitted that any challenge to the title held by his client ought to have been made in the succession proceedings.

16. Counsel for the applicant relied on the following authorities:-

a) **Republic v. Kajiado North District Ngong Land Disputes Tribunal & Another ex parte Caroline Wambugu Ngunjiri & 2 Others (2014) e KLR;**

b) **Republic v. Chairman Uasin Gishu Land Disputes Tribunal & Another ex parte John Arusei Kipto & 13 Others (2014) e KLR;**

c) **Republic v. Chairman Makuyu Land Disputes & 2 others Ex parte Betha Wanjiru Mungai (2015) e KLR.**

17. The common thread in the above cases is that the Land Disputes Tribunals did not have jurisdiction to determine issues of ownership of land.

18. Arguing that the applicant has established a *prima facie* case with probability of success, Mr. Njomo urged the court to allow the application as prayed.

Analysis and determination

19. This being an application for issuance of temporary injunction, to be granted the orders sought, the applicant must satisfy the conditions set in the case of **Giella VS Cassman Brown & Co. Ltd 1973 E.A 358** which are:-

1. **He has a *prima facie* case with a probability of success at the trial.**
2. **Demonstrate that unless the orders sought are granted he might otherwise suffer irreparable injury which would otherwise not be adequately compensated by an award of damages.**
3. **If in doubt, the Court will determine the application on a balance of convenience.**

20. What is a *prima facie* case was defined by the Court of Appeal in the case of **Mrao VS First American Bank of Kenya Ltd Civil Appeal NO. 39 of 2002 (2003 e K.L.R)** in the following words:-

“A *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

21. A temporary injunction being an equitable remedy, it will not be granted where it can be demonstrated that the applicant has not approached the Court with clean hands. Further, as was held in the case of **Films Rover International 1980 3 ALL. E.R 772**, the Court considering such an application should take the course that appears to carry the lower risk of injustice.

22. In applying the above principles to the instant case, from the documents annexed to the applicant's supporting affidavit it is clear that the applicant lost his interest in the suit property through a legal process.

23. Whilst it's true that the Land Disputes Tribunals established under the LDTA lacked jurisdiction to hear and determine disputes concerning title to land or ownership of land, I am unable to agree with the applicant that the mere fact that the Tribunal entertained the dispute preferred before it, when it had no jurisdiction to do so warrants issuance of the orders sought in his favour. I say so, firstly, because the LDTA provided a mechanism of dealing with orders obtained through the proceedings instituted before the Tribunal; Secondly, it is trite law that where a statute establishes a dispute resolution procedure, then the procedure must be strictly followed in resolving the dispute. In this regard see the cases of East Africa Pentecostal Churches Registered Trustees & 1754 others v Samwel Muguna Henry & 4 others [2015] eKLR; Speaker of the National Assembly V Karume (1992) and the case of Francis Gitau Persimeri v. Alliance Party & 4 Others (2012) eKLR; Republic v Susan Kihika & 2 others Ex Parte George Mwaura Njenga [2014] eKLR.

24. The evidence on record shows that the applicant preferred an appeal before the defunct Land Disputes Tribunal which appeal is still pending. It is my considered view that the applicant ought to have pursued his rights through the appellate procedures contemplated under the Act and/or filed judicial review proceedings.

25. As things stand now, if this court were to accede to the applicant plea, it would be tantamount to irregularly setting aside the orders issued through a legally sanctioned process. It matters not that the orders are *prima facie* irregular; the right process of the law must be invoked before the orders can be lawfully set aside.

26. As things stand now, the title held by the applicant has been legally rendered inoperative. Until and unless the order rendering it inoperative is reversed or set aside, that order remains valid and an impediment to the recognition of the title, if any, held by the applicant in respect of the suit property. The title held by 1st respondent, if any, was obtained through a valid court process. The court confirms as much through a ruling delivered on **4th November, 2015** by the Principal Magistrate Kangema Law Courts in LDT Case No. 29 of 2008 where it was held:-

“In this case there is no dispute that the award by Kangema Land Disputes Tribunal was adopted as judgment on 17th November, 2008. The judgment was thereafter stayed on 30th September, 2009 pending the outcome of the appeal before the Provincial Land Disputes Tribunal.

It is clear from the replying affidavit filed by the plaintiff/respondent that she was issued with a title deed on 20/7/2009 before the order of stay was granted. The land in issue had therefore changed hands at the time the stay was granted that is from the defendant/applicant to the plaintiff/respondent. The plaintiff/respondent sold the land to a third party namely Peter Kamau Githaiga and a title deed was issued on 29/12/2014 to him....the case was finalized on 17th November 2008 when the court adopted the award as a judgment of the court.

There is no pending suit between the defendant and the plaintiff before this court. It is therefore not clear which case the defendant/applicant is referring to in prayer (c) of his application...”

27. Concerning the prayer for stay of the proceedings in Murang'a CMCC No.10 of 2015, the applicant not being a party to those proceedings, cannot be heard to say that he has interest in those proceedings. If indeed he has an interest in those proceedings he ought to have applied to be enjoined in those proceedings.

28. With regard to the prayer for stay of the proceedings at Kangema PMCC LDT Case No.29 of 2008, it is clear that there are no pending proceedings in that case that can form the basis of award of such a prayer.

29. On whether this court should stay the proceedings pending at the defunct Land Disputes Appeal tribunal, I find and hold that no case has been made for issuance of that order.

30. To successfully impugn the title held by the 2nd respondent, the applicant should have, by way of evidence, demonstrated that the 2nd respondent was aware of the plaintiff's interest in the suit property at the time he obtained title thereto. In this regard see Sections 25 and 26 of the Land Registration Act, 2012 which provides as follows:

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme...”

Also see Section 80 of the Act which provides as follows:

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

31. There being no evidence capable of showing that the 2nd respondent obtained title to the suit property by fraud or misrepresentation or that his title was acquired illegally, unprocedurally or through a corrupt scheme, I find and hold that the plaintiff has not made a case for interference with

the title held by the 2nd respondent, at least at this stage of the proceedings.

32 The upshot of the foregoing is that the motion herein has no merit. I consequently dismiss it with costs to the 2nd respondent.

Dated, signed and delivered in open at Nyeri this 31st day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Court clerk – Esther

Court was not sitting on 26th January, 2017. Parties were informed verbally to come to court today.